ALM | LAW.COM

New York Law Journal

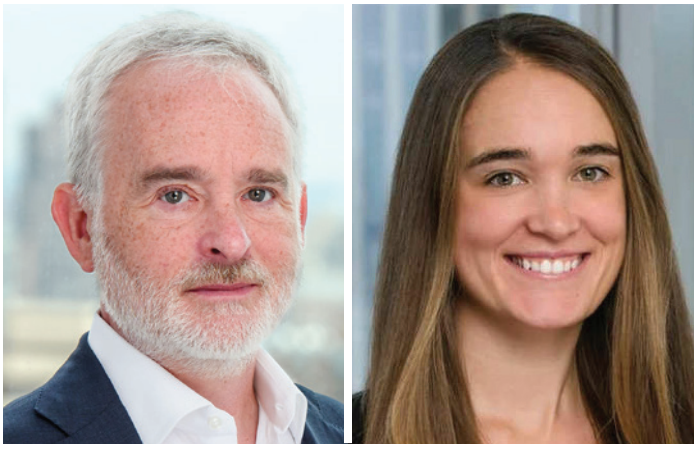
LABOR RELATIONS

# New York Restrictive Covenant Update

By David E. Schwartz and Emily D. Safko

August 13, 2025

This term, the Supreme Court made it easier for members of a majority group to state discrimination claims, temporarily allowed the president's removal of two members of federal agencies, leaving the National Labor Relations Board without a quorum, clarified plaintiffs' burdens under the Fair Labor Standards Act and addressed a military reservist's entitlement to differential pay during active duty. This column addresses these decisions and the significance for employers.



David E. Schwartz and Emily D. Safko

**Reverse Discrimination**

In a unanimous decision, the court in *Ames v. Ohio Department of Youth Services,* No. 23-1039 (U.S. June 5, 2025), held that all individuals should be held to the same pleading standard under Title VII regardless of whether the individual is a member of a protected class.

The petitioner, a heterosexual woman, brought suit against her employer for discrimination, arguing that she was denied job opportunities because of her sexual orientation in violation of Title VII.

The District Court granted summary judgment in favor of the employer, finding that the petitioner did not meet the heightened pleading standard required to make out a prima facie case of discrimination against a member of a majority group.

Applying the "background circumstances" rule, the District Court found that the petitioner failed to present "background circumstances to support the suspicion that the defendant is that unusual employer who

discriminates against the majority." The Sixth Circuit affirmed.

The Supreme Court rejected the "background circumstances" rule, finding it inconsistent with the text of Title VII and the court's precedent.

The court explained that the text of Title VII does not distinguish between those individuals in a majority group versus a minority group and that the same protections under the law apply to every individual – regardless of their membership in a particular class.

---

**A bill proposed in the New York State Senate would ban employers from seeking, requiring, demanding or accepting a covenant not to compete from any employee or health-related professional who is a New York resident or who is employed in New York other than "highly compensated individuals.**

In looking to its precedent, the court emphasized that the burden on the petitioner in the first step of the burden-shifting framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) is not a high one, and courts assessing whether a plaintiff has made out a prima facie case are to "avoid inflexible applications" of this standard.

By applying the "background circumstances" rule to all cases brought by majority-group plaintiffs, lower courts have strayed from these principles.

Because those in the majority group now benefit from the same low bar for establishing a prima facie case of discrimination as others, employers should expect an uptick in discrimination claims.

**Removal Power**

In *Trump v. Wilcox*, 145 S. Ct. 1415 (2025), the Supreme Court granted the government's emergency request to stay the decisions of the lower courts that reinstated Gwynne Wilcox to the National Labor Relations Board (NLRB) and Cathy Harris to the Merit Systems Protection Board (MSPB) following the president's attempt to remove them.

Justice Elena Kagan, joined by Justice Sonya Sotomayor and Justice Ketanji Brown Jackson, dissented.

President Joe Biden appointed Gwynne Wilcox to the NLRB for a term expiring on Aug. 27, 2028. On Jan. 27, 2025, President Donald Trump removed Ms. Wilcox from her position.

In Jan. 2022, Biden appointed Cathy Harris to the MSPB for a term expiring on March 1, 2028. On Feb. 10, 2025, Trump removed Ms. Harris from her position. Both terminations were communicated via email without any stated reason.

For ninety years, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), governed the standard for removal of members of independent federal agencies. Under *Humphrey's*, a president can only remove a member for qualifying cause.

Given this precedent, the District Court for the District of Columbia ruled in favor of each of Ms. Wilcox and Ms. Harris, respectively, granting summary judgment, enjoining the president from removing them from their positions and reinstating them to their positions for the duration of their terms (absent earlier

removal for qualifying cause in accordance with applicable law).

On appeal, the full Court of Appeals for the District of Columbia Circuit upheld the decisions of the District Courts, after a three-judge panel initially stayed the orders.

The government requested emergency relief and the Supreme Court stayed the orders enjoining the president's removal of Ms. Wilcox and Ms. Harris pending its review of the merits of the case.

The court reasoned that the president may remove executive officers without cause if they exercise considerable executive power on his behalf, but did not otherwise opine on the propriety of the removals.

**Employers should take note of the increased scrutiny of restrictive covenants in New York—and elsewhere—to ensure compliance with the evolving landscape governing their enforceability**

Notably, the Supreme Court's decision leaves the NLRB without a three-person quorum. As a result, the NLRB cannot currently issue decisions or regulations. However, the NLRB Office of the General Counsel's Field Offices are continuing to process unfair labor practice cases and representation cases.

**FLSA Exemptions**

In a unanimous decision, the Supreme Court in *E.M.D. Sales, Inc. v. Carrera*, 604 U.S. 45 (2025), clarified the standard of proof an employer must meet to demonstrate that an employee is exempt from the minimum wage and overtime pay provisions of the Fair Labor Standards Act (FLSA).

Specifically, the court held that an employer must demonstrate by a preponderance of the evidence that an employee is exempt under the FLSA and need not meet the more stringent clear-and-convincing evidence standard applied by the lower courts.

In *E.M.D.*, several sales employees argued that their employer violated the FLSA by not paying overtime pay. E.M.D. argued that the sales employees met the "outside-salesman" exemption to the FLSA.

Following a bench trial, the U.S. District Court for the District of Maryland applied the clear-and-convincing-evidence standard and ruled in favor of the employees, finding that E.M.D. did not prove by clear and convincing evidence that the employees were exempt.

The U.S. Court of Appeals for the Fourth Circuit later affirmed the District Court's decision. Notably, only the Fourth Circuit applied the heightened clear-and-convincing evidence standard.

The Fifth, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits applied a preponderance-of-the-evidence standard to similar disputes.

The Supreme Court reversed and remanded the decision of the lower courts, holding that the preponderance-of-the-evidence standard should be applied when an employer seeks to demonstrate that an employee is exempt under the FLSA.

The court held that there are only three circumstances in civil litigation where courts deviate from the preponderance-of-the-evidence standard: (1) a statute establishes a heightened standard of proof; (2) the

Constitution requires a heightened standard of proof; and (3) the government takes "unusual coercive action" against an individual.

The court concluded that none of these three circumstances were present. The court also analogized FLSA cases to Title VII discrimination cases, in which a preponderance-of-the-evidence standard applies.

In a win for employers, the lower preponderance-of-the-evidence standard will apply to exemption disputes under the FLSA.

**Differential Pay**

In *Feliciano v. Department of Transportation*, 145 S. Ct. 1284 (2025), the Supreme Court held that federal civilian employees are entitled to differential pay when called to active duty "during a national emergency" even if there is no "substantive connection" between the service and the national emergency.

Nick Feliciano, an air traffic controller for the Federal Aviation Administration and reserve petty officer for the United States Coast Guard was called to active duty in July 2012 and remained on active duty until Feb. 2017.

During this time, there was an ongoing national emergency. However, Mr. Feliciano did not receive differential pay.

Mr. Feliciano brought a claim alleging that he was improperly denied differential pay while he was on active duty. His claim was rejected, and Mr. Feliciano appealed to the Federal Circuit.

Mr. Feliciano argued that he was entitled to differential pay under a catch-all clause requiring differential pay when called to active duty under "any . . . provision of law during a war or during a national emergency declared by the president or Congress."

The Federal Circuit held that reservists are only entitled to differential pay if they can show a substantive connection between the active duty service and the specific national emergency.

The Supreme Court rejected this standard and, relying on the plain meaning of the word "during," held that a reservist is entitled to differential pay if he serves on active duty while a national emergency is ongoing – regardless of whether there is any connection between the service and the emergency.

Federal agencies should be mindful of this decision when assessing a reservist employee's entitlements when called to active duty.

Employers should expect delays of NLRB decisions for the foreseeable future. Private employers should expect more discrimination claims from majority groups, but less exposure to FLSA claims.

*DAVID E. SCHWARTZ is a partner at the firm of Skadden, Arps, Slate, Meagher & Flom LLP. EMILY D. SAFKO is a counsel at the firm. EMILY BASS, a summer associate at the firm, assisted in the preparation of this article.*